Supreme Court, U.S.
FILED
APR 27 2004
OFFICE OF THE CLERK

No. 03-1109

In The Supreme Court of the United States

MARVIN V. FRANDSEN, JAN L. FRANDSEN, BRYAN MORRIS, FRANK J. CERVASIO, MARIANNE CERVASIO, DIAN HARDISON, and TONIANNE WYNER

Petitioners,

v.

BREVARD COUNTY, FLORIDA and BREVARD COUNTY SHERIFF PHIL WILLIAMS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S RESPONSE TO PETITIONERS' SUPPLEMENTAL BRIEF

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Respondent files this Response to Petitioners' Supplemental Brief and states as follows:

NO CONFLICT EXISTS WITH *CHABAD OF SOUTHERN OHIO V. CITY OF CINCINNATI*, 2004 WL 716870 (6TH CIR. APR. 5, 2004) AS THAT CASE IS FACTUALLY AND LEGALLY DISTINGUISHABLE FROM THE ONE UNDER REVIEW

No conflict exists between *Chabad of Southern Ohio v. City of Cincinnati*, 2004 WL 716870 (6th Cir. Apr. 5, 2004), and the decision under review because the ordinance at issue in *Chabad* was a content-based regulation directed at expressive conduct, and thus is legally and factually distinguishable from the instant case.

Petitioners once again attempt to equate the simple conduct of being nude with protected speech by claiming the Sixth Circuit's decision in *Chabad* somehow conflicts with the Eleventh Circuit's ruling. However, in *Chabad,* the ordinance at issue was directed at restricting the types of public displays that could be set up in a public square during the winter holidays. *Id.* at *8. During that time period, the city claimed exclusive use of the square so that it could control the content and design of the displays. *Id.* at *4. The city wanted to control the content and design of the displays to ensure that the displays would "appeal[] to the widest of audiences." *Id.*

The plaintiff in that case sought to display a menorah at the square. *Id.* at *2. While the city argued that plaintiff had "no free speech right to leave an unattended private structure on private property," the Sixth Circuit rejected that argument based on established precedent, and recognized that "the display of an object such as a

menorah is expressive activity for purposes of the First Amendment." *Id.* at *12.

However, in the case under review, Petitioners do not seek to engage in expressive activity, but merely seek to sunbathe or associate in the nude. The mere conduct of being nude, unlike the expressive activity in *Chabad*, is not expressive conduct entitled to First Amendment protection. *See South Florida Free Beaches, Inc. v. City of Miami, Florida*, 734 F.2d 608 (11th Cir. 1984). Thus, no conflict exists.

Further, in *Chabad,* the Sixth Circuit concluded that the ordinance at issue was content-based and thus subject to strict scrutiny. As Petitioners point out, the Sixth Circuit found that because the stated intention of the ordinance was to ensure that the speech and expression at issue appealed to the widest of audiences, the city necessarily wished to eliminate that speech or expression which might be controversial or offensive.

Petitioners claim that the instant Ordinance regulates the content of speech because it "forbids people to exploit nudity for profit or commercial gain and to advertise outside of Brevard County and the State of Florida the availability of an opportunity for nudity in public places." Petitioners' Supplemental Brief at p. 2. As an initial matter, this is a flat misstatement as the Ordinance places no restrictions whatsoever on advertising. Petitioners' Appendix of Initial Brief at p. 52a.

Further, unlike the ordinance at issue in *Chabad of Southern Ohio,* the Brevard County Ordinance is intended "to prohibit the conduct of being nude in public places," and is not addressed to speech or other constitutionally protected activity. Petitioners' Appendix at p. 48a. The

instant Ordinance also provides an exemption for nude expressive conduct that "is otherwise protected by the United States Constitution or Florida Constitution under existing judicial decisions." Petitioners' Appendix at p. 57a. Thus, the Sixth Circuit's decision in *Chabad of Southern Ohio v. City of Cincinnati* is both legally and factually distinguishable and no conflict exists.

CONCLUSION

Based on the foregoing, Respondent, Brevard County, Florida respectfully requests that this Court deny certiorari and refuse to accept jurisdiction of this matter.

Respectfully submitted,

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